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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROY L. SCHAPANSKY, *et al.*,
Petitioners,

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court resolve a conflict among three federal circuits as to whether Congress intended that, under 5 U.S.C. § 7311(3), anyone who participates in a strike against the federal government (a) *must be automatically* and otherwise arbitrarily removed from federal service (that is, without consideration of mitigating and other relevant factors, including prior imposition of lesser penalties for the same offense under the same statute by the same agency, excellent and lengthy prior public service and unique surrounding circumstances), or (b) *may be automatically* and otherwise arbitrarily removed, at the discretion of the employing agency, or (c) *is entitled, prior to determination of the penalty, to consideration* of all relevant facts?

2. Should this Court resolve a conflict between two federal circuits on the question of whether an affected individual must prove harmful error when a federal agency violates an express minimum procedural requirement imposed by Congress for the benefit of the individual, considering that one circuit answered this question negatively in reliance on this Court's suggestion in *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946)?

3. Does a federal agency's violation of the minimum statutory period granted to a federal employee to reply to agency charges render a removal action on those charges "not in accordance with law" or constitute "harmful *per se*" error, thus requiring reversal of the federal employee's removal under the Civil Service Reform Act of 1978, 5 U.S.C. §§ 7513(b), 7701(c)(2)?

4. Should this Court resolve a conflict between two circuits on the question of whether proof of a federal employee's strike activity prohibited by 5 U.S.C. § 7311(3) or the cross-referenced felony statute, 18 U.S.C. § 1918, requires a showing of intent to strike and/or "concerted activity," not just "parallel" action that could be unique to an individual?

5. Should this Court reverse the decision of the Court of Appeals for the Federal Circuit for failing to apply the proper standard of review, as dictated by this Court, to the Merit Systems Protection Board's departure from the Board's own precedent on statutory interpretation issues of manifestly paramount importance to federal labor law?

LIST OF PARTIES AND CASES

Several petitioners herein had their claims below adjudicated together in a single decision. For purposes of clarity, the following list identifies each party to this petition and the cases in which their claim was decided:

Name of Petitioner	Federal Circuit Decision (Appendix A)	Merit Systems Protection Board Decision (Appendix B)
Richard T. Adams	*Adams/Baracco* *	*Adams*
Gary S. Baracco **	*Adams/Baracco*	*Baracco*
Richard J. Bender	*Adams/Baracco*	*Adams*
Richard Bronleben	*Adams/Baracco*	*Adams*
Antonio Chevalier	*Adams/Baracco*	*Adams*
Thomas R. Connelly	*Adams/Baracco*	*Adams*
Thomas J. Contegni	*Adams/Baracco*	*Adams*
Gerard Curran	*Adams/Baracco*	*Adams*
Anthony L. DiMasso	*DiMasso*	*Adams*
Bernard Dorrance	*Dorrance*	*Adams*
James N. Fry	*Adams/Baracco*	*Adams*
Allan A. Giannattasio	*Adams*	*Adams*
Lawrence G. Martel	*Martel*	*Martel*
Stephen J. Moylan	*Moylan*	*Noa*
Roy L. Schapansky	*Schapansky*	*Schapansky*

* The opposing party in all Federal Circuit and Merit Systems Protection Board cases here listed was the Department of Transportation.

** Under Federal Rule of Appellate Procedure 43, Marjorie F. Baracco, surviving spouse and personal representative of petitioner Gary S. Baracco (deceased), was substituted as a party on motion. *Adams/Baracco v. Department of Transportation*, 735 F.2d 488 (Fed. Cir. 1984).

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DEPARTMENT OF TRANSPORTATION,
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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the major air traffic controller "lead case" judgments and opinions of the United States Court of Appeals for the Federal Circuit, issued on May 18, 1984.

OPINIONS BELOW

The majority, concurring and dissenting opinions of the 5-judge panel in the 11 interrelated cases below were designated by the court of appeals as lead cases for thousands of similar appeals stayed pending action by this Court, and are reported at 735 F.2d 477, *et seq.* Petitioners' cases appear as Appendix A hereto. The decisions by the 3-member Merit Systems Protection Board (the Board) which were reviewed by the court of appeals are reported at 1982 FMSR ¶¶ 7047, 7050; 1983 FMSR ¶ 7019, *et seq.*, with petitioners' cases appearing as Appendix B hereto. The decisions by the Merit Systems Protection Board presiding officials which were reviewed by the Board are unreported, and superseded by the full Board's decisions.

JURISDICTION

All of the interrelated judgments of the court of appeals sought to be reviewed were issued on May 18, 1984. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, October 13, 1978, 92 Stat. 1111, codified in scattered sections of 5 U.S.C., provides in pertinent parts as follows:

> § 7513(b)
> An employee against whom an action is proposed is entitled to—
> . . . .
> (2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;
>
> * * * *
>
> § 7701(c)
> (1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—
> . . . .
> (B) . . . is supported by a preponderance of the evidence.
> (2) Notwithstanding paragraph (1), the agency's decision may not be sustained . . . if the employee . . .
> (A) shows harmful error in the application of the agency's procedures in arriving at such decision;
> . . .
> (C) shows that the decision was not in accordance with law.

The interrelated civil and criminal federal anti-strike statutes are found in titles 5 and 18, respectively, and provide in pertinent parts as follows:

5 U.S.C. § 7311

> An individual may not accept or hold a position in the Government of the United States . . . if he—
>
> . . . .
>
> (3) participates in a strike . . . against the Government of the United States . . . .

18 U.S.C. § 1918

> Whoever violates the [above-quoted] provision of section 7311 of title 5 . . .
>
> . . . .
>
> Shall be fined not more than $1,000 or imprisoned not more than one year and a day or both.

5 U.S.C. §§ 7311, 7513(b), 7701(c), and 18 U.S.C. § 1918 are reproduced in their entirety as Appendix C hereto.

STATEMENT OF THE CASE

Background

Petitioners herein are all air traffic controllers who were discharged by the Federal Aviation Administration (FAA or agency) for alleged strike participation and absence without leave (AWOL) in August of 1981.

The Professional Air Traffic Controllers Organization (PATCO) called a strike by its members against the agency beginning on August 3, 1981. On August 3, 1981, at approximately 11 a.m., EDT, President Ronald Reagan made the following widely publicized announcement regarding the strike:

> "I must tell those who failed to report for duty this morning they are in violation of the law and if they do not report for work within 48 hours they have forfeited their jobs and will be terminated."

Schapansky v. Department of Transportation, 735 F.2d 477 (Fed. Cir. 1984) (*Schapansky*) App. A at 1a, 6a n.4.

Massive confusion existed regarding how this Presidential deadline would be applied. In *Ketchem v. Department of Transportation*, 10 MSPB 557, 561 (1982), the Board stated as follows:

> "[i]n view of the multiplicity of the statements issuing from government officials and the contradictions and ambiguities that they involved, it would have been impossible for any defendant to know with the requisite definiteness whether a strike or a government refusal to permit air controllers to work was in progress after the three shifts had reported subsequent to 11 a.m. on August 5."

(quoting *United States v. PATCO*, 524 F. Supp. 160, 164 n.6 (D.D.C. 1981)) (footnote and citations omitted).

The agency implemented the President's 48-hour deadline in a significantly different manner than the President directed. Under FAA General Notice (GENOT) 130 to FAA facilities, controllers were not supposed to be issued notices of proposed termination until they missed their first regularly scheduled shift beginning on or after 11 a.m., EDT August 5. Baracco Appendix at 139, *Adams/Baracco v. Department of Transportation*, 735 F.2d 488 (Fed. Cir. 1984) (Baracco Fed. Cir. App.). However, most of the persons who were expected to comply with this deadline—the individual air traffic controllers—were not advised of the agency's departure from the President's directive.[1] Nevertheless, nationwide, approximately 1,200 controllers returned to duty prior to what turned out to be their deadline shift and were not disciplined. *Schapansky*, App. A at 6a n.4. *See PATCO v. Department of Transportation*, 529 F. Supp. 614, 615 (D. Minn. 1982). Individuals who missed their deadline shift were not permitted to report for work, even if they attempted to do so. *See, e.g., Martel v. Department of Transportation*, 735 F.2d 504 (Fed. Cir. 1984) (*Martel*), App. A at 39a, 43a.

With the exception of the inserted dates and names, each notice of proposed removal to employees was identical, charging participation in a strike against the United

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[1] The agency selectively called only certain air traffic controllers to advise them of their deadlines. *Matson v. Department of Transportation*, MSPB No. DE075281F0748 (Sept. 30, 1983).

States government forbidden by 5 U.S.C. § 7311 and 18 U.S.C. § 1918 and absence without leave until the date of the notice of proposed removal (the date of the individual's "deadline shift"). Baracco Fed. Cir. App. at 131.

Each proposed removal letter invoked the provision of 5 U.S.C. § 7513(b), which requires that a charged employee be given a "reasonable time, but not less than 7 days" to reply to the agency's charges. These letters, however, required an answer "*within*" 7 calendar days.

Petitioners submitted written requests seeking, *inter alia*, information concerning discipline imposed in similar situations in the past, to enable them to respond to the charges, and for an extension of the time to reply to the charges. These requests were all denied in accordance with agency directives delineated in GENOT 147, Baracco Fed. Cir. App. at 141.

The agency determined that unexplained absence during a deadline shift was sufficient proof of illegal striking. No other proof of intent or concerted activity was required, although some additional evidence (*e.g.*, proof of picketing) was considered in individual cases. The FAA admits that it "determined as a matter of policy, that all individuals found to have participated in the unlawful strike would be removed" without consideration of other relevant factors. Respondent's Response to National Interrogatory No. 20, App. D at 165a.

Proceedings Below

Each petitioner filed a timely petition for appeal, received a hearing and an adverse decision from a presiding official of the Board, and subsequently filed a timely petition for review with the 3-member Board. In a series of designated "lead case" decisions rendered in 1982 and 1983, the Board upheld each petitioner's removal. A 5-judge panel of the Federal Circuit upheld the Board's lead case decisions regarding each petitioner.[2]

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[2] A petition for *certiorari* has been filed in the related lead case of *Campbell v. Department of Transportation*, 735 F.2d 497 (Fed.

REASONS FOR GRANTING THE WRIT

1. THE COURT BELOW SUSPENDED THOUSANDS OF SIMILAR APPEALS, PENDING POSSIBLE REVIEW BY THIS COURT OF THESE LEAD CASES, WHICH RAISE ISSUES OF COMPELLING PUBLIC IMPORTANCE.

Cases and issues embraced by this petition originally were selected by the Merit Systems Protection Board and designated as the "lead" air traffic controller cases and issues, the resolution of which would affect directly or resolve similar pending appeals brought by thousands of other air traffic controllers who were discharged for allegedly striking in August 1981. 48 Fed. Reg. 2235-36 (Jan. 18, 1983).

On February 24, 1983, the court of appeals entered an order suspending all other air traffic controller cases, and delaying docketing until it made its decision on the lead cases and issues on a consolidated basis. The court recognized the compelling importance of these lead cases by assigning them to a 5-judge panel. On May 18, 1984, the court of appeals decided these lead cases and issues and sent a Notice to Counsel and Petitioners in Air Traffic Controller Litigation. This notice enclosed copies of the "opinions in the Air Traffic Controller 'Lead Cases,'" and stated that the suspension, "in all other Air Traffic Controller cases will remain in effect until final disposition of all the 'Lead Cases.'"[3]

Cir.), *petition for cert. filed*, No. 84-78 (U.S. July 18, 1984), and counsel for petitioners has been informed that a petition for *certiorari* will be filed in the related lead case of *Anderson v. Department of Transportation*, 735 F.2d 537 (Fed. Cir. 1984).

[3] The court apparently took the unusual action of continuing the suspension, rather than disposing of the other cases on the basis of the lead cases, because of its assessment of the likelihood that this Court would review the decisions in this potentially landmark litigation. It is submitted that such a judgment by the court of appeals of the nature of the issues and cases involved is worthy of weight in consideration by this Court.

The court of appeals' Notice to Counsel and Petitioners in the suspended cases cited its decisions imposing strong sanctions against "the prosecution of frivolous appeals." This will likely have a chilling effect even on many of those with factually distinguishable cases, particularly those who have filed *pro se* appeals with the court. Rejection of this petition would result in the worst possible situation—leaving unanswered many issues of critical importance to all federal employees and sealing the fate of certain employees whose arguments never will be heard. Thus, an early and definitive resolution by this Court of controlling general issues is crucial.[4]

Apart from the large number of non-party discharged air traffic controllers affected directly by these lead cases, the broadly applicable statutory construction issues presented are unsettled, are likely to recur and are not limited to the Federal Circuit. For example, resolution of the harmful error rule's applicability to agency departures from statutory or constitutional requirements will have a broad impact on a wide variety of cases. The court of appeals in effect repealed the statutory requirement of an irreducible minimum 7-day reply period before disciplining any federal employee, creating confusion as to whether there is *any* minimum reply period. Definition of what constitutes a *prima facie* case of striking against the government will determine the showing necessary before any federal employee loses his or her freedom, job or, because the government has a monopoly on a career in the air traffic controller cases, the ability to practice a chosen profession.

This Court should resolve a conflict among the circuits on whether removal for striking against the government is (1) automatic and mandatory; (2) up to the agency's total and unreviewable discretion; or (3) may be imposed only after a rational, judicially-reviewable agency deci-

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[4] *See Laing v. United States*, 423 U.S. 161, 167 (1976); *United States v. Standard Oil Co.*, 332 U.S. 301, 302 n.2 (1947); *United States v. Powell*, 330 U.S. 238, 240 (1947).

sion. The lack of any clear guidance as to the applicable legal standards is critical, especially in view of the likelihood of future federal sick-outs and wildcat strikes recurring from time to time.[5]

The court of appeals asserted that—

> We join enthusiastically in the general desire for symmetry in law and procedure, and nothing here said is thought to make a fundamental difference in either (*except perhaps for recognition that mitigation is irrelevant when striking is proved, infra*).

Schapansky, App. A at 7a (emphasis added). After admitting that "[i]deal justice, and government personnel regulations, envisage equal treatment of persons similarly situated," *Schapansky*, App. A at 15a, the court of appeals declined to consider whether other federal government strikers who were treated far more leniently were in fact similarly situated. Moreover, the court of appeals failed to justify its singling out striking as the only offense where mitigation and comparable treatment are *not* relevant.

2. DENIAL OF THE STATUTORILY-MANDATED MINIMUM PERIOD TO REPLY TO AGENCY CHARGES REQUIRES REVERSAL OF THE AGENCY ACTION; THE COURT OF APPEALS' FAILURE TO SO HOLD IS ERRONEOUS AND CONFLICTS WITH A CIRCUIT COURT DECISION THAT RELIED UPON THIS COURT'S ANALYSIS.

Under 5 U.S.C. § 7513(b), a federal employee against whom an agency disciplinary action is proposed is entitled to at least 30 days' advance written notice to answer the charges. However, when the agency has reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment may be im-

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[5] Bureau of Labor Statistics figures show that 22 federal and Postal Service work stoppages (strikes within the meaning of 5 U.S.C. § 7311) occurred from 1962 through 1979, involving more than 200,000 employees. "Work Stoppages in Government, 1979," Gov't Employee Rel. Rep. (BNA) Reference File 71: 1011, 1014.

posed (as the agency asserted against petitioners), the employee is entitled to—

> a reasonable time, *but not less than 7 days*, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer.

5 U.S.C. § 7513(b)(2) (emphasis added). In her concurring opinion in *Adams/Baracco v. Department of Transportation*, 735 F.2d 488 (Fed. Cir. 1984) (*Adams/Baracco*), App. A at 20a, 36a, Judge Nies acknowledged that a minimum 7-day reply period is "unquestionably required by 5 U.S.C. § 7513(b)(2)," a point not disputed by the majority opinion.[6]

Under 5 U.S.C. § 7701(c)(2), the Board may not sustain an agency decision if the employee "shows harmful error in the application of the agency's procedures" or "shows that the decision was not in accordance with law." In petitioner Baracco's case, the Board concluded that the legislative history of the CSRA is ambiguous as to the standard of review Congress intended to apply to violations of statutory procedures. 1983 FMSR ¶ 7021, App. B. at 76a, 85a. Apparently overlooking interpretive regulations derived from non-statutory sources, such as rules of practice and personnel manuals, the Board incorrectly deduced that, because "reasonable and properly promulgated regulations . . . have the force and effect of law," application of the "not in accordance with law"

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[6] On a separate point, Judge Nies' concurring opinion erred in relying upon language from a report on a proposed Senate bill that would have required reversal only where the agency's " 'procedural error substantially impaired the rights of the employees.' " App. A at 37a. Congress specifically *rejected* that language in the bill and its intent as stated in the Senate report. The existing language of 5 U.S.C. § 7701 was derived from the materially different House bill, H.R. 11280, which accorded employees greater procedural rights, including a greater opportunity upon appeal, to demonstrate harmful error. *See, e.g.*, H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 7, 21 (1978); *see also Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority*, 464 U.S. ——, 104 S. Ct. 439, 446 (1983) (Congress rejected language from Senate bill).

standard to statutory violations would "render the harmful error provision meaningless since no procedural violations would then be subject to it." *Id.* App. B at 86a.

The Board held that the agency erred by providing petitioner Baracco only six days to reply—a period clearly below the irreducible statutory minimum.[7] App. B. at 91a. The court of appeals upheld the Board's conclusion that petitioner failed to prove by a preponderance of the evidence that the agency's error had a harmful effect upon the outcome before the agency and thus held that reversal was not warranted. *Adams/Baracco*, App. A at 22a-23a n.3. Despite the Board's identification of this question as a separate lead issue,[8] extensive written and oral argument from the parties and an *amicus* brief from one of the prime congressional sponsors of the CSRA, the court affirmed the Board and disposed of the entire issue in a cryptic footnote. *Id.*

In so ruling, the Board and the court of appeals ignored the Court of Claims decision in *Stringer v. United States*, 90 F. Supp. 375 (Ct. Cl. 1950). That decision required strict compliance with Section 14 of the Vet-

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[7] In a letter dated August 14, 1981, denying petitioner Baracco's request for an extension of time to reply, Chief Viselli stated that petitioner had to reply *prior* to August 18, *i.e.*, before the seventh day. Although extensively briefed and argued, the court of appeals' majority opinion ignored this evidence and Board finding, focusing exclusively on a separate issue, and refusing to find that the wording of the proposed removal letter that "you may reply to this notice . . . . within seven days after you receive this letter" itself compelled a reply before the end of the seventh day. App. A at 22a-23a n. 3. The language of the proposed notice was explicit—petitioners had to reply *within* seven days—and clearly required petitioners to reply prior to expiration of the statutory minimum period, thus separately violating 5 U.S.C. § 7513(b).

[8] Whether the provision of less than seven days in which to respond to the charges against an appellant constitutes harmful procedural error under 5 U.S.C. 7701(c)(2)(A), and/or serves to render the FAA's decision in those cases not in accordance with law under 5 U.S.C. 7701(c)(2)(C).

48 Fed. Reg. at 2236.

erans' Preference Act (a predecessor to the CSRA), which in turn provided that federally-employed veterans receive the full statutorily-mandated advance written notice to reply to agency charges.[9] The court of appeals' failure to consider *Stringer* is inconsistent with its concurrent holding in the lead case *DiMasso v. Department of Transportation* (*DiMasso*), that it is bound by pre-CSRA Court of Claims precedent:

> *this court is bound by Court of Claims precedent,* which has held that there is "nothing improper" about about an agency's predetermining the penalty of removal, *provided that the employee has full opportunity to present facts rebutting the charges.*

735 F.2d 526 (Fed. Cir. 1984) (emphasis added); App. A at 60a, 64a. Moreover, this statement conflicts with the court's approval of the agency's imposition of a predetermined penalty on petitioner Baracco despite the agency's failure to afford him a "full opportunity [as defined by 5 U.S.C. § 7513(b)] to present facts rebutting the charges."

In *Ommaya v. National Institute of Health*, 726 F.2d 827, 830-31 & n.5 (D.C. Cir. 1984), the court held that the Board may not apply the harmless error doctrine to a failure to adhere to procedures required by the constitution or statute, because such an application would be contrary to the principles enunciated by this Court in *Kotteakos v. United States*, 328 U.S. 750, 764-

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[9] In reversing the agency action for failure to accord the employee the full statutory time, the Court of Claims stated:

> the law requires not merely that there be time to answer but that there be thirty full days of notice . . . . Nor can we accept defendant's contentions that plaintiff must show wherein he was harmed by the insufficiency of the notice period and that the doctrine of *de minimis non curat lex* applies here. We cannot construe a statute that plainly says "at least thirty days" as meaning "not quite thirty days." The requirements of Section 14 are specific and mandatory. Neither this court, nor the Civil Service Commission, nor the Chief of Engineers can disregard them. Strict compliance is required.

Id. at 379 (citations omitted).

65 (1946) and by the D.C. Circuit in *White v. Department of the Army*, 720 F.2d 209 (D.C. Cir. 1983).

The D.C. Circuit's decision in *Ommaya* was handed down after oral argument in the present cases. On March 27, 1984, counsel for petitioners submitted the opinion to the Federal Circuit pursuant to Local Rule 16, explicitly referencing the harmful error ruling.[10] Nevertheless, none of the Federal Circuit opinions in these cases discussed either the D.C. Circuit's decision or its rationale.[11]

It is well-established that the rule of harmless error must be used with extreme caution where, as here, basic procedural rights are at stake. *See, e.g., Doe v. Hampton*, 566 F.2d 265, 277-78 n.29 (D.C. Cir. 1977); *Cheung v. INS*, 418 F.2d 460, 464 (D.C. Cir. 1969). The D.C. Circuit has stated that "the Board should not be in the business of affirming administrative decisions based upon how an agency might have acted if it had followed proper procedures." *Horne v. MSPB*, 684 F.2d 155, 157-58 (D.C. Cir. 1982).[12] Moreover, courts have recognized that some procedural rights are so significant that they constitute "substantial rights of an employee" such that their denial is harmful error, *per se*, "even absent evi-

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[10] Another Federal Circuit decision involving the nature of the requisite harmful error under the CSRA, which was invoked by petitioners and the agency below, is the subject of a pending petition for certiorari filed by the Solicitor General. *Devine v. Nutt*, 718 F.2d 1048 (Fed. Cir. 1983), *petition for cert. filed* No. 83-1673 (U.S. April 13, 1984).

[11] Furthermore, none of the Federal Circuit opinions discussed the argument submitted in an *amicus curiae* brief by the Honorable William F. Ford, who served as chairman of the House Committee which reported the bill that became the CSRA, was a floor manager for the bill in the House and served on the conference committee. Congressman Ford's analysis of the CSRA's legislative history demonstrated that employees should not be required to prove that an agency's violation of the statutory right to a minimum 7-day reply period constituted harmful error.

[12] In *Horne*, the D.C. Circuit reviewed an MSPB decision that relied heavily on the "harmful error" doctrine. *Horne v. Interstate Commerce Commission*, 3 MSPB 259 (1981).

dence that the violation led to a loss of evidence or other measurable adverse effects." *Devine v. White*, 697 F.2d 421, 443 (D.C. Cir. 1983). *See Ryder v. United States*, 585 F.2d 482, 487-88 (Ct. Cl. 1978).

The right to a meaningful opportunity to reply, and the statutory assurance of at least seven days' time to prepare for the reply, are recognized as such "substantial rights." In *Ratley v. Department of the Army*, 11 MSPB 564, 567 (1982), the Board applied this principle to the 7-day requirement.[13]

3. THE COURT OF APPEALS' RULING REGARDING THE PENALTY IMPOSED UPON PETITIONERS CONFLICTS WITH ITS OWN RULINGS AND THOSE OF OTHER CIRCUITS, INCLUDING A DISTRICT OF COLUMBIA CIRCUIT DECISION RELIED UPON BY BOTH SIDES BELOW.

Because of a conflict among the circuits on the issue of whether removal is automatic and mandatory for striking, review by this Court is necessary to ensure national uniformity on an issue of paramount importance to the proper functioning of the civil service system.

The Ninth Circuit has held, without any substantive analysis, that 5 U.S.C. § 7311 forbids the continued employment of federal, including Postal Service, strikers. *American Postal Workers Union v. United States Postal Service*, 682 F.2d 1280 (9th Cir. 1982), *cert. denied*, 459 U.S. 1200 (1983). To the contrary, the Seventh Circuit has held explicitly that the federal government is not required to fire striking employees. In *United States v. PATCO*, 653 F.2d 1134, 1141 (7th Cir.), *cert. denied*, 454 U.S. 1083 (1981), which dealt with an alleged 1980 PATCO strike at a single facility, the court reasoned that requiring the federal government to fire all strikers would impair seriously provision of essential services, creating "precisely the sort of result that the statutory pro-

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[13] *See* section 5, *infra*.

visions were intended to prevent." [14] Furthermore, the Second Circuit has noted that, although section 7311 "appears to speak in absolute terms . . . [t]here is a substantial question whether this statute must be read in a manner which would require the government to dismiss all controllers . . . ." *United States v. PATCO*, 438 F.2d 79, 82 n.2 (2d Cir. 1970), *cert. denied*, 402 U.S. 915 (1971).

Other courts have condoned the practice of imposing lesser penalties than removal on striking federal employees, including air traffic controllers.[15] Moreover, if section 7311 were to require that strikers be fired, it would also bar their rehiring, for it states that a striking employee "may not accept or hold" a government position. Injunctions against strikes by federal workers consistently have included "back-to-work" clauses that would be unlawful if section 7311 were an absolute ban on employment of strikers.[16] Finally, in the instant case, President Reagan's 48-hour moratorium would be *ultra vires* under such an interpretation of section 7311.

In their briefs and oral arguments to the court of appeals, both sides relied upon the following holding of the D.C. Circuit condemning automatic agency imposition of one uniform penalty for a given offense regardless of individual circumstances:

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[14] The government's brief in that case characterized dismissal of striking controllers as "a preposterous remedy for the FAA to consider." It further noted, "In the event of a nationwide strike the overall remedy would be more catastrophic than a strike itself." These statements are inconsistent with respondent's position in the briefs below in the present cases, demonstrating that the government itself is confused on this point.

[15] *Miller v. Bond*, 641 F.2d 997, 1000 (D.C. Cir. 1981); *Benson v. Dow*, 520 F. Supp. 231, 232-33 (W.D. Pa. 1981).

[16] *See, e.g., United States v. Robinson*, 449 F.2d 925, 928 n.6 (9th Cir. 1971); *United States v. Moore*, 427 F.2d 1020, 1022 (10th Cir. 1970); *United States v. PATCO*, 524 F. Supp. at 164; *United States v. Branch 60, National Association of Letter Carriers*, 312 F. Supp. 619, 622 (D. Conn. 1970).

> An agency must therefore select an appropriate disciplinary sanction *based on the specific facts of the particular case before it; it may not automatically impose a fixed penalty for a specific category of misconduct regardless of individual factors.*

Parsons v. Department of the Air Force, 707 F.2d 1406, 1410 (D.C. Cir. 1983) (citing *Douglas v. Veterans Administration*, 5 MSPB 313 (1981)) (emphasis added). *See American Federation of Government Employees v. General Services Administration*, 711 F.2d 261, 265 (D.C. Cir. 1983). Despite the unusual unanimous agreement by the parties on the most persuasive applicable precedent, the court of appeals did not cite *Parsons*, and issued a decision squarely in conflict with *Parsons* and the Board's seminal *Douglas* decision.[17]

In addition, the court of appeals' lead case decisions, while purporting not to decide whether removal is mandatory for striking, *Schapansky*, App. A at 14a, adopted a course that, from an equal protection standpoint, is manifestly unfair and unworkable. The court required federal agencies neither (a) to fire all strikers nor (b) to make reasoned penalty choices based on individual circumstances and to justify such decisions in light of alleged disparate punishments imposed in comparable situations. Instead, the court essentially held that Congress, in enacting section 7311, intended to allow federal agencies to be arbitrary, granting them unreviewable discretion to pick and choose at random or on some other irrational basis which situations and individuals will be subject to the ultimate civil service penalty and which will receive little or no punishment for the same conduct.[18]

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[17] *See* section 5, *infra*.

[18] See footnotes 1, *supra* and 34, 35, *infra*, for examples of arbitrary treatment by the agency and the Board. Such unrestrained agency action has been condemned by this Court in a variety of situations. *E.g., Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. ——, 103 S.Ct. 2856 (1983); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); *Burlington Truck Lines, Inc. v. United States*, 371 U.S.

The court of appeals' affirmance of the penalty imposed in *Schapansky* fundamentally misreads the Board decisions in question and conflicts with the court's own precedent and decisions by other circuits. Illustrating pervasive confusion on this point are two diametrically opposed statements by the court in *Schapansky* of what the Board held below. The court erroneously stated:

> Reading [5 U.S.C.] § 7311 as *mandating removal* when a charge of striking is sustained, the Board rejected Schapansky's contention that removal was unreasonable.

App. A at 5a (emphasis added).[19] The court correctly stated about the same Board decision:

> Sustaining the agency's determination that discharge was an appropriate penalty, the Board *declined to rule on whether it had authority to mitigate* it. In light of 5 U.S.C. § 7311, it held that dismissal "cannot be deemed clearly excessive or disproportionate to a sustained charge of striking."

Id. at 12a (emphasis added).

The court's confusion extended to its own precedent, as exemplified by the following statement:

> this court is bound by Court of Claims precedent, which has held that there is "nothing improper" about an agency's predetermining the penalty of removal, provided that the employee has full opportunity to present facts rebutting the charges.

DiMasso, App. A at 60a, 64a (citing *Pascal v. United States*, 543 F.2d 1284, 1289 (Ct. Cl. 1976)) (footnotes

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156 (1962); *SEC v. Chenery Corp.*, 318 U.S. 80 (1943); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). *See also Contractors Transport Corp. v. United States*, 537 F.2d 1160 (4th Cir. 1976) (disparate treatment of similarly situated applicants arbitrary and capricious because rational basis for decision not discernible from agency order).

[19] The Board in fact stated in *dicta* that the statute *could* be read to mandate removal under one possible reading. *Schapansky*, App. B at 65a, 72a.

omitted). *See Schapansky*, App. A at 19a. Because of this mistaken conclusion that *Pascal* had already decided that issue, the court of appeals failed to engage in any analysis. The language that the court of appeals viewed as foreclosing treatment of this issue consists of an intimation of the Court of Claims in *dicta*. In *Pascal*, the Court of Claims specifically found that the plaintiff's charges that the agency had predetermined to remove him were "not proven." Thus, its subsequent discussion concerning the propriety of the agency making up its mind about the penalty, is pure *dicta* and not binding authority as the court stated in *Schapansky*.

The court of appeals correctly cited its prior ruling that agency penalties will be overturned in either of two situations, where—

> the penalty exceeds that permitted by statute or regulations *or* is so harsh that it amounts to an abuse of discretion . . . . *Weston v. U.S. Department of Housing and Urban Development*, [724 F.2d 943, 949 (Fed. Cir. 1983)].

Schapansky, App. A at 12a (emphasis added). Three paragraphs later, however, the court ruled that mitigation is irrelevant in these cases because "Congress has determined that removal is *an* appropriate penalty for striking against the government." *Id.* at 13a (emphasis added). Congress' determination that removal is *an* appropriate penalty obviously only satisfies the first half of the 2-part inquiry set forth in *Weston* and endorsed in *Schapansky*. Court of appeals and Board precedent also required the agency to consider whether, given all the relevant factors, including mitigation and consistency of the penalty with those imposed upon other employees for the same or similar offenses, the penalty was an abuse of discretion.[20] *Nagel v. Department of Health and Human Services*, 707 F.2d 1384, 1386-87 (Fed. Cir. 1983); *Par-*

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[20] *See* section 5, *infra*, on the Board's disregard of its own precedent.

sons v. Department of the Air Force, 707 F.2d at 1410; *Douglas v. Veterans Administration*, 5 MSPB at 331-32.[21]

Only if Congress had determined that removal were *the only* appropriate penalty for striking against the government (*i.e.*, removal is mandatory, with no discretion vested in agencies to make reasoned decisions) would all of the numerous potentially relevant factors be irrelevant.[22] The court of appeals explicitly declined to so rule, stating: "Whether removal is mandatory under 5 U.S.C. § 7311 or 18 U.S.C. § 1918 need not be decided here." *Schapansky*, App. A at 14a.[23] Indeed, respondent requested that the court avoid this issue,[24] apparently so as to preserve agency discretion not to remove all strikers under all circumstances. What the court failed to recognize, however, is that such discretion must be exercised in a reasonable fashion, after taking due account of all relevant factors. These factors include, *inter alia*, consistency of the penalty with that imposed in comparable situations. The court treated this factor as irrelevant in *Schapansky*, *id.* at 13a, despite the necessity of evaluating consistency to restrain arbitrary agency punishments for the same conduct, varying from no discipline to removal with a permanent bar on re-employment.

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[21] *See* note 31, *infra*, on *Douglas*.

[22] *Douglas* specifically stated that "a penalty may be excessive in a particular case even if within the range permitted by statute or regulation." 5 MSPB at 333 n.71 (citing *Power v. United States*, 531 F.2d 505, 507-08 (Ct. Cl. 1976), *cert. denied*, 444 U.S. 1044 (1980); *Rifkin v. United States*, 209 Ct. Cl. 566, 584-85 (1976), *cert. denied*, 429 U.S. 1098 (1977)).

[23] 5 U.S.C. § 7311 previously read "[n]o person *shall* accept or hold office or employment in the government of the United States who participates in a strike." Pub. L. No. 84-330, § 18 p-r, 69 Stat. 624 (1955), *reprinted in* 1955 U.S. Code Cong. & Ad. News 704 (emphasis added). In 1966, Congress replaced the mandatory word "shall" with the term "may" in the current version of § 7311 "[a]n individual may not accept or hold a position . . . ." Pub. L. No. 89-554, 80 Stat. 378. Apparently, this change was effected to permit reasoned, flexible responses to strikes.

[24] *E.g.*, *Baracco* Federal Circuit Respondent's Brief at 44.

The court erroneously viewed the penalty analysis in all-or-nothing terms; prior court cases approving the continued employment of government strikers "cannot be viewed as forever binding the government against the removal of *any* striker under *any* circumstances." *Schapansky*, App. A at 14a (emphasis added). This straw man misstates the alternative to the court's abdication of its responsibility to decide the issue. The real alternative is Board and judicial review to ensure that the agency made a rational decision and demonstrated legitimate reasons for disparate treatment.

4. THE COURT OF APPEALS' DECISION THAT PROOF OF MERE UNEXPLAINED ABSENCE DURING A STRIKE CONSTITUTES A *PRIMA FACIE* CASE OF STRIKING AGAINST THE GOVERNMENT CONFLICTS WITH RULINGS BY OTHER FEDERAL COURTS.

In *Schapansky*, App. A at 10a, the court of appeals held that "[u]nexplained absence during a strike of general knowledge establishes that the employee 'intended' to strike" and thus suffices to constitute a *prima facie* case against an employee. The court concluded that "[i]f a requirement for proof of intent resides in 5 U.S.C. § 7311, (and we need not and do not decide that question here) proof of general intent suffices." *Id.*

In a decision stemming from the same August 1981 PATCO strike involved in the lead cases, however, the Tenth Circuit held that proof of (a) FAA warnings of the illegality of a strike and the requirement to contact the FAA and show availability to work; (b) the defendants' unexplained, unauthorized absence both before and after being ordered to return to duty; and (c) their vote for, and support of, an averted June 1981 strike, may have shown parallel activity, but was insufficient to show the requisite concerted activity in August to prove striking. *United States v. McCubbin*, Nos. 81-2054 through

2063 (10th Cir. Aug. 22, 1983);[25] *see United States v. Martinez*, 686 F.2d 334 (5th Cir. 1982).

The court of appeals attempted to dismiss these cases as "inapt" in *Adams/Baracco*, App. A at 25a, because they were "criminal cases, in which proof must meet a beyond-a-reasonable doubt standard and in which mere proof of absence was found consistent with resignation," citing *McCubbin* and *Martinez*. The "resignation" analysis applies at most, however, only to *Martinez*, leaving an unresolved conflict with *McCubbin*.[26]

Any contention that *McCubbin* is inapplicable to the instant situation solely because it is a criminal contempt case is unconvincing. It is insignificant whether, in establishing a violation of 5 U.S.C. § 7311, the government must prove specific intent beyond a reasonable doubt (as applied in *McCubbin*), by clear evidence (as applied in *Tennessee Valley Authority v. Bailey*, 495 F.Supp. 711 (E.D. Tenn. 1980)) or by a preponderance of evidence (as applicable to the instant case). The important point is that proof of a petitioner's specific intent to withhold his or her services in concert with others is a necessary element of establishing any violation by that petitioner of section 7311.[27] Apparently, the Board previously recognized this principle in the case of *Trick v. Federal Aviation Administration*, 8 MSPB 618, 621

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[25] Tenth Circuit Local Rule 17 provides in relevant part: "Unpublished opinions, although unreported, can nevertheless be cited, if relevant, in proceedings before this or any other court."

[26] The Tenth Circuit, citing the civil standards established in *Tennessee Valley Authority v. Bailey*, 495 F. Supp. 711 (E.D. Tenn. 1980), held that the government did not sustain its burden of proving criminal contempt of the anti-strike order because it proved merely *parallel, not concerted*, activity.

[27] The terms "strike" and "participate in a strike" as used in 5 U.S.C. § 7311 mean "an actual refusal in concert with others to provide services to one's employer." *United Federation of Postal Clerks v. Blount*, 325 F. Supp. 879, 884 (D.D.C.) (3-judge court), *aff'd*, 404 U.S. 802 (1971). This definition was endorsed by the court of appeals in *Schapansky*, App. A at 8a.

(1981), wherein it stated, "the issue as to whether the appellants willfully participated in an unlawful strike may not be determined except on the basis of the intent manifested by the individual appellants."

In the lead cases, however, the Board and the court of appeals failed to apply this standard, choosing instead to hold that a *prima facie* case of striking may be established by merely proving unauthorized absence during a strike of general knowledge. This holding conflicts with *McCubbin* and *Tennessee Valley Authority v. Bailey*, 495 F.Supp. at 712, a civil case which held that proof of the defendants' absence from work without explanation was insufficient to demonstrate that "any one or more of the 21 defendants . . . had actually refused in concert with someone else to provide services to the plaintiff."

5. THE COURT OF APPEALS APPLIED A STANDARD OF REVIEW TO THE BOARD'S DEVIATION FROM ITS OWN PRECEDENT THAT IS IMPROPER UNDER THIS COURT'S DECISIONS.

Recent decisions by this Court have mandated a rigorous standard of judicial review for agency departures from a course of behavior or interpretation of a statute. For example, this Court has emphasized that—

> A "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to." *Atchison, T & S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-08 (1973). Accordingly, an agency changing its course . . . is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.

Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. ——, 103

S.Ct. 2856, 2866 (1983).[28] These standards of review have been applied by lower courts in a wide range of factual circumstances.[29]

Review by this Court is necessary to correct the court of appeals' failure to apply the requisite standard of review to the Board's unwarranted departure from its settled course of behavior. The Board decisions that were affirmed by the court of appeals were rife with unexplained, sharp changes in course and departure from established Board precedent. The most dramatic example is the Board's 180 degree departure (without explicitly overruling) from the following holding:

> Because 5 U.S.C. § 7513(b)(2) provides that an employee must have at least 7 days to respond to an agency charge, *any shorter period of time is inherently unreasonable and violates the requirements mandated by statute and is thus not in accordance with law.* . . . [W]e find that a suspension taken without complying with the procedural requirements of 5 U.S.C. § 7513(b)(2) *clearly constitutes harmful error* under 5 U.S.C. § 7701(c)(2)(A).

Ratley v. Department of the Army, 11 MSPB 564, 567 (1982) (citations and footnotes omitted) (emphasis added).

In its opinion in *Baracco*, the Board contradicted this specific language and concluded that the agency decision in *Ratley* was reversed, not because violation of section 7513(b)(2) rendered the decision "not in accordance with law," but rather because reduction of the reply pe-

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[28] Generally, an agency must follow its own precedent or explain its reasons for refusing to do so in a particular case. *Secretary of Agriculture v. United States*, 347 U.S. 645, 652-54 (1954); *see Public Interest Research Group v. FCC*, 522 F.2d 1060, 1064 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976).

[29] *E.g., Public Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984); *NAACP v. FCC*, 682 F.2d 993, 998 (D.C. Cir. 1982); *Local 777 v. NLRB*, 603 F.2d 862, 882 (D.C. Cir. 1978). *See Atwell v. Merit Systems Protection Board*, 670 F.2d 272, 281-82 (D.C. Cir. 1981) (strict standard of review of Board construction of the CSRA).

riod substantially impaired Ratley's ability to defend himself, thus supporting a finding of harmful error. App. B at 89a. The Board's abrupt, unjustified departure from the course it established in *Ratley* renders its decision in the instant case arbitrary and capricious. Despite briefing and argument on this point, the court of appeals' terse affirmance did not even refer to the Board's abrupt reversal of its interpretation of the CSRA in *Ratley*. *Adams/Baracco*, App. A at 22a-23a n.3.

The court of appeals also affirmed without proper scrutiny the Board's unwarranted departure from its fundamental precedents on rational imposition of penalties. In the seminal, judicially-sanctioned case of *Douglas v. Veterans Administration*, 5 MSPB at 332-33,[30] the Board established the rule that, in reviewing an agency's imposition of a penalty, it must assure that the agency conscientiously considered the relevant factors and reached a responsible balance within the limits of reasonableness. If the Board finds that the agency failed to weigh the relevant mitigating and other factors *or* that the agency's judgment clearly exceeded the limits of reasonableness, the Board must specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness. *Id.* at 332.[31]

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[30] *See, e.g., Nagel v. Department of Health and Human Services*, 707 F.2d 1384, 1386 (Fed. Cir. 1983); *Parsons v. Department of the Air Force*, 707 F.2d 1406, 1409 (D.C. Cir. 1983).

[31] The Board stated that the relevant factors include the following:

> (1) The nature and seriousness of the offense, and its relation to the employee's duties, position and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
>
> (2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
>
> (3) the employee's past disciplinary record;

Douglas and its progeny require that, before an agency may impose a penalty on an employee, several relevant factors *must* be considered and weighed. Not only did the Board in *Schapansky* ignore relevant mitigation and consistency of the penalty factors, but it implicitly eliminated one of the two bases upon which *Douglas* established that an agency penalty may be reversed—*i.e.*, failure to consider all relevant factors. The Board addressed only the unreasonableness of the penalty as a ground for reversal.

Moreover, the nature and seriousness of the offense explanation the Board offered (which was endorsed by the court of appeals, *Schapansky*, App. A at 13a) for departing from the norm conflicts with previous Board decisions. In reviewing a removal of an employee for threatening an agency investigator with a loaded gun, the Board held that the seriousness of the offense *cannot*

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(4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;

(5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;

(6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;

(7) consistency of the penalty with any applicable agency table of penalties;

(8) the notoriety of the offense or its impact upon the reputation of the agency;

(9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;

(10) potential for the employee's rehabilitation;

(11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter;

(12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

Id. at 332 (footnote omitted).

justify ignoring all mitigating and other factors, even in cases where the conduct charged may constitute a felony—

> In his initial decision, the presiding official found that although the agency had not considered factors such as appellant's length of service and his past disciplinary record, these factors were not relevant in view of the "egregious" nature of appellant's conduct which warranted removal. We disagree. In *Douglas v. Veterans Administration*, MSPB Docket No. SF075299024 at 33-34 (April 10, 1981), we noted that not all of the factors which are generally recognized as relevant would be pertinent in every case. *However, the nature and seriousness of the offense is but one of the factors which should be considered and weighed in determining the reasonableness. Thus, although the nature of the offense may be so serious as to outweigh the other factors, it does not follow that the other factors can be ignored.* *Id.* at 33-34.

Sisemoore v. Department of the Navy, MSPB No. BN07528110207 (Oct. 28, 1982) (Slip op. at 2) (emphasis added).[32]

The court of appeals specifically approved the Board's ruling in the lead cases, contrary to Board precedent in *Douglas* and *Sisemoore*, that the serious nature of the offense justified disregarding other factors completely. *Schapansky*, App. A at 13a. Logically, however, it is

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[32] *See* cases reversing agency removals for failure to weigh mitigating factors: *Washington v. Tennessee Valley Authority*, 1 MSPB 525 (1981) (possession of firearm on agency property); *Davis v. Department of the Treasury*, 8 MSPB 17 (1981) (failure to pay income tax timely); *Grimm v. U.S. Postal Service*, 9 MSPB 491 (1982) (second offense of assault); *Grandison v. Department of the Navy*, 7 MSPB 194 (1981) ("serious" offense of assault). *See also* section 3, *supra*; *Yoshida v. Department of Navy*, MSPB No. SF07528010108 (Jan. 4, 1983) (upholding 15-day disorderly conduct suspension for throwing a wrench at a supervisor while shouting threatening remarks).

precisely in this one area where the court condoned ignoring other factors—where the most serious penalties are involved—that such factors as consistency of the penalty and mitigation are most important.

Here, for example, petitioner Roy L. Schapansky served as an Air Force fighter pilot, was a Korean War veteran, had 24 years of unblemished and honored service as an air traffic controller, and was eligible for retirement in six months when he was fired. *See* Schapansky Fed. Cir. App. at 110, 122-24, 138. He attempted to return to work on August 17, 1981, but was not permitted to do so. *Id.* at 138. The court of appeals and the Board erred in failing to require that the agency at least take these relevant factors into account in assessing the penalty (*see Douglas, supra* n.31).

The court of appeals' decision cannot be allowed to stand under this Court's test—

> we must "consider whether the *decision was based on a consideration of the relevant factors* and whether there has been a clear error of judgment." *Normally an agency rule would be arbitrary and capricious if if the agency has* relied on factors which Congress has not intended it to consider, [or] *entirely failed to consider an important aspect of the problem* . . . . The reviewing court should not attempt itself to make up for such deficiencies: "we may not supply a reasoned basis for the agency's action that the agency itself has not given."

Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. at ——, 103 S.Ct. at 2866-67 (citations omitted) (emphasis added).

Furthermore, the Board's holding conflicts with the admitted fact that employees who participated in strikes against the FAA in 1970 and 1981 are now employed by the agency. *E.g.*, Schapansky Fed. Cir. App. at 121. *See Miller v. Bond*, 641 F.2d 997 (D.C. Cir. 1981); *Benson v. Dow*, 520 F. Supp. 231 (W.D. Pa. 1981). The Board held previously that—

> [W]here an appellant raises an allegation of disparate treatment in comparison to specified employees, the agency must prove a legitimate reason for the difference in treatment by a preponderance of the evidence before the penalty can be upheld. *Douglas v. Veterans Administration*, 5 MSPB 313, 333-34 (1981).

Woody v. General Services Administration, 6 MSPB 410, 411 (1981).

In *Ramirez v. Department of the Air Force*, MSPB No. DA07528010067 (Dec. 2, 1982), the Board ruled that the presiding official wrongfully had placed the burden to establish disparate treatment on the appellant, when, properly, "the agency had the burden of proving legitimate reasons for the difference in treatment." *Id.* at 3, citing *Woody*. Here no such showing was made by the agency.

In *Capozella v. Federal Bureau of Investigation*, 10 MSPB 474 (1982), the Board held that a reduction in grade was proper rather than the removal imposed by the agency. The Board placed great weight on evidence that, while the appellant FBI agent was removed for wearing women's clothing on duty for misguided purposes, 12 other special agents who had engaged in serious misconduct varying from driving while intoxicated to assault were given more lenient punishment ranging from censure to a 30-day suspension. The behavior that the Board compared to Mr. Capozzella's offense described a far greater range of misconduct than any difference between the charges against petitioners and the conduct committed by the 1970 and 1981 returning strikers.

Douglas and its progeny are inconsistent with the Board's position here. As discussed in section 3, *supra*, the court of appeals made an unsupportable attempt to distinguish petitioners' case from the *Douglas* line of decisions—"Congress has determined that removal is *an* appropriate penalty for striking." *Schapansky*, App. A at 13a (emphasis added). *See* footnote 22, *supra*.

Despite the fact that petitioners presented these arguments in the lead cases, the court of appeals dismissed them with an inexplicable, terse statement in *Schapansky*, App. A at 15a, that "*amici's* strong assertion that the Board disregarded here its own approach to determination of the appropriateness of a penalty [citing *Douglas* and *Woody*], is unsupported in the record." What is unsupported is this bald assertion by the court. Nowhere in the record did the agency, the Board or the court analyze mitigating factors and disparate punishment as is required under applicable precedent.[33]

The court of appeals illogically constructed a blanket distinction between those strikers who, for example, unknowingly happened to return to work *on or before* what turned out to be their extended August 18th deadline shift (and who were not punished) and those who attempted to return *during or after* their August 5th deadline shift, but were turned away and dismissed.[34] The court's bright line distinction between those who "elected'" to return and those who "chose not to do so," *Schapansky*, App. A at 14a, ignored the fact that many of those fired *did* elect to return, with only bad luck separating

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[33] Even if it were generally true in other contexts that "[u]neveness in application of a penalty is not a ground for invalidating it," *Schapansky*, App. A at 14a, the Board in these cases erred by deviating unjustifiably from its own precedent requiring the agency to prove legitimate reasons for disparate punishment.

[34] *See, e.g., Benson v. Department of Transportation*, MSPB No. PH075281F1021 (Mar. 5, 1984) (slip op. at 7) ("confusion engendered by the President's statement and statements by agency officials"); Statement of the Case, *supra*; *compare Bader v. Federal Aviation Administration*, MSPB No. NY075281F206 (Nov. 4, 1982) (unappealed final presiding official decision) (reinstating 3 controllers who tried to return 6 hours after the start of their 8 a.m. August 6th deadline shift), *with Parsons v. Department of Transportation*, MSPB No. BN075281F0626 (Oct. 6, 1983) (upholding dismissal of controller who attempted to return 6 hours after the start of his 2 p.m., August 5th deadline shift), and *Bergh v. Department of Transportation*, MSPB No. SE075281F0401 (Sept. 30, 1983) (upholding dismissal of controller who tried to return on August 6th).

them from those who, equally ignorant as to their deadlines, happened to return in time.[35]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[35] *Compare Mangano v. Department of Transportation*, MSPB No. NY075281F1058 (Oct. 3, 1983) (reversing removal of controller who did not attempt to return when he found out his leave had been cancelled—"[a]ppellant's contention that he thought it was too late to return to work after receipt of his notice is logical and further corroborated by appellant's testimony that another air traffic controller whom he specifically identified by name was not allowed to return to work because he reported one hour past his deadline shift.") (slip op. at 3), *with Benson v. Department of Transportation, supra* (reversing removal of controllers who were prematurely told by their supervisor that they had been hired, but affirming dismissal of controllers who relied upon the same information as relayed by the reinstated controllers) (*see* Devaney dissent).